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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 87.

WALTER K. WARREN,

Petitioner,

against

UNITED STATES OF AMERICA, as owner of the Steamship *Anna Howard Shaw, et al.,*

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF THE UNITED STATES LINES COMPANY, *AMICUS CURIAE.*

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STATEMENT.

United States Lines Company moved on December 8, 1950 for leave to file a brief *amicus curiae*. Permission was granted by this court on January 2, 1951. The order provided that the brief be filed January 5th. It was not possible to have a brief prepared in advance of the permission because briefs of the counsel for the parties were not at hand. Indeed, by courtesy of the clerk of this court, a copy of the brief of the Solicitor General was received as this brief goes to press.

The interest of the United States Lines Company is set forth in its motion for leave to file this brief. For brevity's

sake it will not be repeated. It is sufficient to say that as a private shipowner it has substantial interest in the disposition of the issues here involved, in order that it might deal with claims of a similar nature which are presently pending and which will frequently arise in the conduct of its business. The questions involve all private shipowners.

Petitioner complains of the dismissal of his libel for maintenance and wages to the end of the voyage sought because of personal injuries suffered in a shore accident. Petitioner fell from an unprotected ledge which jutted from the outside wall of a "dance hall" located in Bagnoli, Italy. Both the Court of Appeals for the Second Circuit and the district court concluded that petitioner's conduct was reckless. The district court, although implying that petitioner was not fully sober, said that petitioner's conduct was not sufficiently reckless to bar him from recovery. The Court of Appeals said that petitioner failed to exercise even a minimal degree of care for the consequences of his act and denied recovery under the familiar doctrine that seamen who injure themselves by reason of their owns acts of culpable misconduct, indiscretion or gross negligence may not recover maintenance.

The Facts.

Scant attention is paid by petitioner in his brief to the facts found by the trial and appellate courts and accordingly it is necessary to state the facts as they appear in the testimony, the courts' opinions and findings.

In the majority of shore injury cases the shipowner has little or no evidence with which to combat the assertions of a seaman who is injured at a great distance from the ship. Thus, in the case at bar, except for hospital records which

show that petitioner was intoxicated at the time of his accident, all of the evidence on the vital features of the case are derived directly from petitioner.

Petitioner was a messman employed on the Steamship *Anna H. Shaw* which voyaged to the Bay of Naples. On October 30th, 1944, petitioner in the company of other members of the crew, went ashore in a small boat (R. 33). He and two of his shipmates walked along the shore line (R. 34), and entered the town of Bagnoli (this town was erroneously referred to by petitioner as Magnolia) (R. 101). The buildings of the village showed the effects of bombs and shell fire (R. 102). During their walk, the three men divided a 12 ounce bottle of wine.

Hearing music issuing from one of the buildings petitioner and his companions entered it and found it to be a "dance hall" where wine could be procured (R. 35). There were native women present who by means of smiles and gestures arranged to dance with petitioner and his companions (R. 81). When not dancing the women sat at a table with petitioner and his companions. They did this for about an hour and a half during which period the three men again shared another 12 ounce bottle of wine (R. 81, 82).

Thereupon petitioner decided to look around and entered an adjoining room (R. 83). This room faced on the Bay of Naples. It had a number of large French doors which were open (R. 37, 38). Petitioner ventured out on a narrow ledge which projected beyond the building a distance of about 2½ to 3 feet (R. 66, 67). This ledge was wholly unprotected by any railing whatsoever (R. 38, 67). Nonetheless petitioner proceeded out on it although there was a sheer drop of about 35 feet to rocks which were at the foot of the building (R. 83).

The trial court in its opinion describes the petitioner's reckless action as follows:

> "* * * The french doors of the window extended to the level of the floor and he [petitioner] observed a sort of wholly unprotected ledge or balcony, which extended out from the building some two and a half or three feet. There was no railing of any sort and the slightest misstep or unsteadiness was almost sure to precipitate libellant. In any event, it was a perilous undertaking to go out upon this balcony and one even more perilous to lean over the edge to get a better view of the rocks and waves immediately below. But this is what libellant did. * * *" (R. 102).

During the trial petitioner demonstrated that before he fell he brought his feet to within 6 inches of the edge of the ledge and leaned over so that his head protruded beyond it (R. 85). As he did so, he took hold of a thin rod, only slightly more than ⅛" in diameter (R. 38, 69, 102). He recognized that this was not a hand hold and described it as a "lightning arrester or something like that." (R. 38). He made no effort to try it out to ascertain how secure it was (R. 38). He merely glanced at it casually (R. 67, 70). He attempted to support his overbalanced position by this rod and he fell 35 feet below when the rod failed to support his weight and pulled away from the building (R. 38, 39).

He was taken to the 118th Army hospital by United States military police where a diagnosis of fractured leg and "alcoholism, acute" was made (R. 73)—Respondent's Exhibit A. He received treatment for some time and was then transferred by plane to the United States and ended his hospital treatment in a marine hospital near his home.

As might be expected petitioner denied that he suffered from "acute alcoholism" (R. 73). There is no other hospital evidence on this point. However, the variety of stories

given by petitioner as to the manner of his accident leads to the conclusion that alcohol must have confused his mind at the time of his fall. For example, in his claim (R. 93), and libel (R. 5), he says he fell when the railing around a balcony on which he was standing collapsed. Admittedly this did not happen (R. 38). When he entered the Stapleton Marine Hospital petitioner's story was that he fell from a sea wall (Exhibit 3). He gave still another version at the Detroit Marine Hospital (Exhibit B). His shipmates reported to the master that petitioner had fallen off a cliff while ashore. Incidentally, the rest of the log entry is also significant. It reads:

> "On October 30, 1944, at Naples, Italy, Walter K. Warren, messman, on this date injured himself in fall; sent to 118th Station Hospital, Naples, Italy, for treatment. Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, carpenter, and James M. Barr, messman, stated Warren was sober. Injury 'apparently accidental.'" (R. 86).

Petitioner seeks to charge the shipowner with the cost of maintenance and wages for injuries which were suffered while he was not in the service of the ship as those words are used in every day English. He was either so under the influence of alcohol that he failed to appreciate the danger of leaning over the ledge or he was aware of the danger and was reveling in his contempt for it. In either case maintenance was properly denied.

The Questions Presented for Decision.

The questions fall into two classes. The first class is the petitioner's right to recover maintenance under the general maritime law of the United States and the second

concerns his right to such maintenance under the terms of the Shipowners Liability Convention, 1936, 54 Stat. 1693.

Here petitioner was injured while ashore for pleasure when he became overbalanced while leaning from an unprotected ledge and fell 35 feet. He was not in the service of the ship, was ashore solely for his own pleasure and is consequently not entitled to maintenance. Moreover, his conduct was so reckless as to debar him from recovery.

The Shipowners Liability Convention has no application to this case. It is not self-executing. Even if it were self-executing it did not change the law respecting the shipowner's maintenance obligation. Exceptions in the treaty (Article 2—section 2) exempt the shipowner from liability under the facts in this case.

POINT I.

PETITIONER HAVING BEEN INJURED WHILE ASHORE FOR HIS OWN PLEASURE IS NOT ENTITLED TO MAINTENANCE AND WAGES.

Until the case of *Aguilar* v. *Standard Oil Co. of New Jersey*, 318 U. S. 724 the federal courts held that seamen injured while on shore for personal pleasure were not entitled to be reimbursed for maintenance and cure. *Collins* v. *Dollar S. S. Lines, Inc., Limited*, 23 Fed. Supp. 395; *The President Coolidge*, 23 Fed. Supp. 575; *Smith* v. *American South African Line, Inc.*, 37 Fed. Supp. 262; *Lilly* v. *United States Lines Co.*, 42 Fed. Supp. 214; *Wahlgren* v. *Standard Oil Company of New Jersey* (1941) Amer. Mar. Cas. 1788. These cases followed early American cases which had adopted the ancient maritime codes. However, this Court, in *Aguilar* slightly changed the law and there allowed a seaman who was injured while "returning" to his vessel through a refinery plant, his maintenance and cure. A

companion case, *Waterman* v. *Jones*, decided at the same time, similarly allowed recovery but there the seaman was walking on the dock to which the vessel was moored.

In its opinion, this court expressed considerations for seamen which were *dicta*. Actually the court limited its decision to the facts in the cases then before it, viz: seamen injured returning or leaving the vessel while at the place where the vessel was docked. The court said (318 U. S. 724) at page 737:

> "* * * We can see no significant difference, therefore, between imposing the liability for injuries received in boarding or quitting the ship and enforcing it for injuries incurred on the dock or other premises which must be traversed in going from the vessel to the public streets or returning to it from them. That much, at least, is within the liability. How far it extends beyond that point we need not now determine * * *."

Feeling constrained by the *dicta* in the *Aguilar* case, a number of courts have allowed maintenance to seamen for injuries sustained in bar room brawls, on public streets and even for injuries sustained when the seaman jumped from a window to escape an irate husband who had caught the seaman in a bedroom with his wife. *Koistinen* v. *American Export Lines, Inc.*, 194 Misc. (N. Y.) 942.

The trial court in the case at bar similarly felt required to accept the dicta of *Aguilar* (R. 104, 106, 107).

The reluctance of the trial court in reaching its conclusion is illustrated by the following sentences in the opinion:

> "* * * Every drunken brawl in every waterfront dive would put the shipowner to expense as long as the injured seaman maintained he was an innocent bystander and the shipowner could not prove the contrary. The shipowner would in effect become an

> insurer of the safety of his men, on and off the ship, subject to his chance of establishing misconduct" (R. 104).

This court's opinion in the *Aguilar* case does suggest the allowance of maintenance to seamen injured ashore while there for pleasure but its reasoning is based on misconception. The court first says that the ancient maritime codes left the matter in doubt. It next says that seamen as a class are subject to unusual discipline, lack of freedom and opportunity for relaxation. Finally, the court says, that because of the foregoing, the question of seamen's right to maintenance on account of injuries received ashore, being one of first impression, should be decided by liberal considerations for the seamen.

There is no real room for doubt that under the ancient maritime codes a shipowner was not liable for injuries received ashore while the seaman was there for his own pleasure. These codes are found in Volume 30 of Federal Cases beginning with page 1169.

Article VI of the Laws of Oleron, page 1174, is quite specific. It requires the shipowner to provide for cure and maintenance, only if the seaman is wounded or otherwise hurt while acting under "• • • the master's orders and commands. • • •" The laws of Wisbuy, Article XVIII (30 Fed. Cas. 1191) after providing for the liability in the event that a seaman is injured in the ship's service ashore states "• • • but if he goes ashore on his own head to be merry, and divert himself, or otherwise, and happens to be wounded, the master may turn him off; • • •". Similarly the Laws of Hanse Towns, Article XXXIX, (30 Fed. Cas. 1200) provide that seamen wounded in the service of the ship shall be cured at the charge of the ship "• • • but not if he is wounded otherwise. • • •"

The codes specifically provided for maintenance in the case of injuries suffered ashore while in the master's business. No such provision was necessary if it were intended that there should be liability also for injuries suffered otherwise. Indeed, the codes say there was no such liability.

It is clear, therefore, that under the ancient maritime codes seamen injured while ashore for pleasure were not entitled to be maintained and cured at the expense of the ship. No case prior to *Aguilar* allowed maintenance to a seaman injured ashore for pleasure.

Mr. Justice Rutledge in discussing the life of a seaman adverts to the description of it given by Mr. Justice Story in the cases of *Harden* v. *Gordon et al*, 11 Fed. Cas. 6047 and *Reed et al v. Canfeld*, 20 Fed. Cas. 11641. These opinions are over 100 years old.

It is anachronistic to describe present day seamen in the same terms. Their working conditions are as good if not better than the average shore worker. The greater part of American seamen have passable education. They are organized in several unions which seamen themselves direct with considerable success. On their special behalf, the unions publish newspapers which instruct and inform them with regard to their legal rights on ships, as to shipping generally and even enter vigorously into the field of national and international politics and economics.

Moreover the conditions on shipboard have vastly improved. Ships are rarely out to sea on the extended voyages which marked Justice Story's time.

It should be realized that the men who follow the sea do so solely from choice. (In Justice Story's time, they were often shanghaied.) They receive high pay for unskilled work and excellent board and lodging. It is doubtful that the middle class people of this country eat as well as seamen do. Their food and living quarters are healthful.

They receive about $75 per week for straight time. They are well paid for overtime and receive bonuses for extra risks. The United States Coast Guard maintains a watchful eye on the conduct of shipowners and ship's officers so that no improper conditions or discipline exist on ship board. Moreover, the seamen's unions make the shipowners and officers "toe the mark" with great exactness under the constant threat of strike.

Thus the conditions which prompted Mr. Justice Story to make his remarks with regard to the seamen of his day have long since disappeared. The court which applies them to a seaman of today may feel the emotional satisfaction which anyone feels who believes he is protecting the weak and friendless. However, in so doing he confuses words with reality. More and more the courts are discarding irrelevant even though fondly remembered tradition in an effort to base decisions on reality.

Another argument advanced in the *Aguilar* opinion is that by virtue of their calling, they are confined to the ship while it is at sea, and thus deprived of opportunities for relaxation and amusement. So deprived, the argument continues, they are unable to work well, unless opportunity for relaxation is provided ashore. Such relaxation is supposed to make them more efficient and thus serve the ship better. Anything the seamen do therefore, according to the *Aguilar dicta*, which makes them more efficient is done for the benefit of the ship. Not only is the premise false but so also is the conclusion.

Seamen usually work no more than 7½ hours a day. During the middle of their four hour periods of work, they have "coffee time" which lasts for 15 minutes or more. There are radios for their diversion, many seamen carrying their own. Thus, they are provided with the same type of entertainment which shore workers enjoy. They have

also the companionship of other seamen not on duty. During their non-working hours, they relax and enjoy themselves with men of their own social level. Their free time also permits them to educate themselves for better jobs. They have no "rush hour" to endure as is the sad case of most shore workers when they ride to and from their place of work in busses or subways. Actually seamen have more free time than shore workers because they do not have to travel to their place of work.

It is common for seamen to remain away from their ship while it is in port and they frequently return to it totally unfit to perform any service for the ship. In truth therefore, it cannot be justifiably said that the shore leave benefits the ship. It is more often a detriment.

No other industry is charged with the obligation to pay wages and provide medical treatment to their employees injured away from their places of work and while enjoying the pleasures of life. None of the compensation laws which have been enacted for the benefit of shore workmen provide for such benefits. Nor is there any compelling reason why seamen should be so protected.

The cases which have followed the *Aguilar* decision are a fair cross section of the litigation which the *Aguilar* decision has apparently spawned. Attached to this brief is a short appendix (pp. 24-26) which synopsizes the facts of the cases decided to date which extend the limits of the *Aguilar* decision. They range from barroom and street brawls to bedroom escapades.

The evils which follow from this line of decisions are numerous. Foremost they encourage fraud. The injuries are suffered in places far beyond the cognizance of the

ship's officer personnel and are usually impossible to investigate. For example, in the case at bar petitioner told a variety of stories as to how his injuries came about. He did not even remember the name of the town in which they occurred. It was not until the time of the trial that it was discovered to be Bagnoli, not Magnolia as alleged by petitioner (R. 23). Under oath, petitioner denied in answers to interrogatories that he had used intoxicants (R. 22) but at the trial, admitted having done so (R. 36, 71).

The hopelessness of the situation from the shipowner's viewpoint is apparent from the action which the trial court took in the case at bar, as to petitioner's alcoholism. The court accepted the testimony of petitioner that he was not acutely alcoholic at the time of his accident and rejected the disinterested and objective evidence of the United States hospital records. These hospital records showed unqualifiedly that petitioner was suffering from "acute alcoholism". Thus the court vindicated the unreliable petitioner by compromising his protestations of sobriety and the hospital record of acute alcoholism into a finding that petitioner "was not so under the influence of liquor as to be barred from recovery" (R. 108).

A similar situation arose in *Sullivan* v. *United States*, 73 F. Supp. 525 aff. 179 F. 2d 924. There a seaman who had consumed about twenty glasses of beer which admittedly made him "feel good" and "happy" but "not stupidly drunk", was found to be in the service of a ship as he walked along a street in Brooklyn, N. Y., two hours before he was to report for work. The vital features of Sullivan's testimony were at variance with the stories he had given police officers and United States Marine Hospital but this impartial evidence was rejected and the testimony of the interested money seeking seaman accepted. And so it goes. Defense of claims by seamen to maintenance based upon

alleged misconduct thus becomes a mirage. Even though the shipowner by such diligence as it has at its command, produces impartial testimony, it is disregarded in favor of the seaman.

In the *Sullivan* case (179 F. 2d 924), speaking of the shipowner the Court of Appeals said (p. 925):

> "The appellant also submits cogent arguments for denying recovery under such circumstances as the case at bar presents. But if the principles of the Aguilar case are to be so restricted, a decision to that effect must be obtained from the court of last resort."

Among the circumstances referred to was the fact that Sullivan was not on articles, did not sleep on board the ship and, indeed, received an allowance for board and lodging for sleeping ashore. His injuries occurred while he was approaching the ship, while still on a public street and while he was somewhat under the influence of liquor.

The rejection by the trial court of the Army records in the case at bar is not decried because the court accepted petitioner's rather than the shipowner's evidence, but merely to point out the impossibility of successfully defending a case of this kind and the magnificent opportunity thus presented to seamen to mulct steamship companies.

Another shocking example of an award of maintenance to a seaman for injuries received ashore is *Koistinen* v. *American Export Lines*, 194 Misc. (N. Y.) 942. There the seaman having visited various barrooms met a prostitute in one and went with her to her room. According to Koistinen's testimony he had a change of heart but the prostitute insisted on pay. When Koistinen refused to pay her the woman locked the door leaving Koistinen a window as the only way out. At that moment a man appeared in the

doorway. (The impossibility of a human being appearing in a locked doorway never occurred to the trial judge.) Koistinen fearing bodily injury from the man who passed through the locked door jumped from the window and broke his leg. The court said that because Koistinen had changed his mind, his actions ceased to be vicious and his injuries received escaping from his prior immoral conduct were chargeable to the shipowner.

It would be impossible for the shipowner to find out whether Koistinen's story was true. It might very well have been that having satisfied himself, he refused to pay and attempted to avoid doing so by leaping from the window.

The *Koistinen* case seems to establish the rule that if at the moment of injury a seaman has withdrawn from his vicious conduct, the shipowner is liable for maintenance. By the same reasoning if the injury took place after completion of the vicious act, the shipowner would still be liable for maintenance. Apparently a seaman needs only wit enough to testify that at the moment of his accident he had ceased pursuing immoral conduct. He could charge the shipowner with the costs of his maintenance even though his injuries were directly connected with and resulted from his immoral or vicious conduct.

To sum up therefore, the *dicta* of the *Aguilar* is not sound. There is no historical basis for allowing seamen maintenance for injuries sustained ashore while there for pleasure nor is there today any acute need by the seamen for such unusual protection. A rule of law allowing maintenance and wages in such circumstances is unjust to the shipowner for it leaves him defenseless in claims of this kind and opens the door to fraud by the seaman. A reappraisal of the attendant circumstances should lead this

court, in justice, to confine the *Aguilar* decision to its strict facts and in the case at bar to affirm the decision of the Court of Appeals for the Second Circuit.

If the seamen's needs require allowance of maintenance for injuries received while ashore for pleasure legislation to that effect would undoubtedly have been urged by seamen's unions. They have never done so. Indeed, they have never even urged, except in the case at bar, that the Shipowner's Liability Convention, 1936, 54 Stat. 1693 should be enforced for that purpose. If the need were present seamen through their lawyers and unions would have urged an early construction of the convention.

It follows that seamen, their counsel and unions have never thought that they were entitled to maintenance for injuries received ashore while there for pleasure. Thus there is no need for this court to extend the doctrine announced in the Aguilar decision to include injuries occurring in public places while the seaman is ashore for pleasure.

POINT II.

PETITIONER'S INJURIES WERE DUE TO HIS DELIBERATE ACTS OF INDISCRETION AND HIS OWN MISCONDUCT. RECOVERY FOR MAINTENANCE AND WAGES WAS PROPERLY DENIED.

The *Aguilar* case (318 U. S. 724) recognizes that in the case of injuries due to the seaman's indiscretion or misconduct there is no liability on the part of the shipowner for maintenance. Thus the court said at page 730:

> "* * * So broad is the shipowner's obligation, that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility. * * *"

On page 734:

> "* * * the seaman's fault, unless gross, cannot defeat it; * * *"

Again on page 731:

> "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. * * *"

That petitioner was negligent is conceded by everyone in the case. The trial court found that he was negligent (R. 109) as did the Court of Appeals. The trial court describes petitioner's entry upon the unprotected ledge as a perilous undertaking where the slightest misstep or unsteadiness was almost sure to precipate him to serious injury. "It was a perilous undertaking for him to go out on the ledge and even more perilous to lean over the ledge to get a better view." The court held that petitioner's conduct did not amount to recklessness or gross negligence because petitioner says he took hold of a thin rod about ⅛ of an inch in diameter. However, petitioner did not even know the purpose of the rod, nor the method of its fastening. He had not examined it but had given it only a casual glance. In effect the trial court held that because petitioner while deliberately unbalancing himself took hold of a "straw" he was not reckless. What act more reckless short of jumping from the ledge is hard to imagine.

It was held in *Jackson* v. *Pittsburgh S. S. Co.* (CCA 6th) 131 F. 2d 668 that jumping from the side of the ship to the dock, a distance of 6 feet amounted to such recklessness as to destroy Jackson's claim to maintenance.

Petitioner's dangerous act was far worse than what Jackson did. When there is added the fact that petitioner was also at least somewhat under the influence of alcohol,

the conclusion that he was "indiscreet" not to say grossly negligent is an inescapable conclusion and so found by the Court of Appeals.

Recovery was properly denied because of petitioner's misconduct.

POINT III.

THE SHIPOWNER'S LIABILITY CONVENTION HAS NO APPLICATION TO THIS CASE. IT IS NOT SELF-EXECUTING AND ITS PROVISIONS ARE IMPOSSIBLE OF ENFORCEMENT. EVEN IF IT WERE SELF-EXECUTING IT DID NOT CHANGE THE LAW RESPECTING THE SHIPOWNER'S MAINTENANCE OBLIGATION AND UNDER IT PETITIONER MAY NOT RECOVER MAINTENANCE.

Despite the general, confusing and indefinite language of the Convention, petitioner in Point I of his brief (page 10) asserts that the provisions are positive, self-implementing, creating enforceable liabilities. He refers at great length to the reports of the International Labour Conferences and connected matters but he never comes to grips with the precise terms of the Convention.

For example, Article 2 provides as follows:

> 1. The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;
>
> (b) death resulting from such sickness or injury.

While the article, in terms, provides for a liability for sickness and injury, the extent of the liability is not defined therein nor any other place, unless it be considered that Articles 3, 4, 5, 6 and 7 fix the limits of the shipowner's liability. Articles 3 and 4 describe maintenance and cure

in its well understood terms. Article 5 provides for the payment of wages during the time the sick or injured seaman remains on board the vessel. Article 6 requires the shipowner to defray the expenses of repatriation of a sick or injured seaman. Article 7 requires the shipowner to defray burial expenses.

Nothing is said in the Convention with regard to other damage elements which are awarded under the Jones Act (Title 46 U. S. C. A. Section 688). Under this statute, on proof of negligence, the seaman may recover damages for pain and suffering, permanent injury and loss of wages.

In the case of death, the Convention fails in any respect to define the extent of the liability imposed on a shipowner except insofar as it is required to pay funeral expenses (Article 7). The Convention creates a liability against a shipowner but not in favor of anyone. No beneficiaries are designated.

If, as petitioner contends, the Convention is the supreme law of the land, by implication, it overrules the Jones Act (46 USCA 688) and Death on the High Seas Act (46 USCA 761). The terms of the Convention, as now interpreted by petitioner, would not permit the enforcement of these statutes. His argument is that the expression in the Convention "national laws may provide" refers to some future act, and not to law, whether decisional or legislative, existing when the Convention was ratified.

No doubt petitioner would refuse to go to the point where his logic carries him but he cannot have it both ways. If the Convention is the last word in the regulation of the duties of shipowners to sick and injured seamen, these statutes no longer have any force and effect and seamen are relegated to maintenance, some wages and free burial.

Petitioner's position in this regard is not in any wise aided by Article 12 of the Convention. That article provides as follows:

> "Nothing in this Convention shall affect any law, award, custom, or agreement between shipowners and seamen which ensures more favorable conditions than those provided by this Convention."

Nothing is said as to who should be favored, shipowner or seaman. This is another confusing article. It cannot be construed to be "favorable to the seaman" because one of the alleged purposes of the Convention was to level off competition among shipowners by providing equal benefits to seamen. (H. R. Report No. 1328, 76th Congress 1st Sess.)

The United States Lines does not here urge that the court agree with petitioner's logic, but maintains that the Convention is not self-executing and that the statutes and decisional law in force at the time of the ratification of the Convention still remain in full force and effect.

Another illustration of the non self-executing character of the Convention is Article 1, Section 1, which states:

> "This convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation."

Again an exception is permitted with regard to this, but, according to petitioner, to be enforceable, national laws must be enacted subsequent to the date of ratification of the Convention. Thus, by petitioner's logic, the Convention overrules the Longshoremen and Harbor Workers' Compensation Act (33 USCA 901 *et seq.*). It hardly needs

argument that the United States Senate did not intend by ratification of the Convention, to overrule the Compensation Act, Jones Act or Death on the High Seas Act.

That the interested parties did not concede that the Convention was fully self-executing is plainly stated in the report referred to by Mr. Chief Justice Stone in the *Aguilar* case, 318 U. S. 724 at 734. That report is No. 1328, 76th Congress, First Session, H. R. 6881. The Congressional Committee which prepared a bill to implement the Convention refused to take a position as to whether the Convention was or was not self-executing. Moreover, the President requested implementing legislation. The bill prepared to implement the Convention was never enacted. So far as counsel can discover, failure of enactment was due to opposition of both labor and industry.

The terms of the Convention and their impact on the existing laws of the United States make it inconceivable that the Convention be regarded as self-executing. Its terms are so general, so confusing and so indefinite that if self-executing the convention could not be administered. It is submitted that it is not self-executing.

Even if the Convention be regarded as self-executing the facts in this case come squarely within the exception provided in Article 3, Section 2, Subdivisions (a) and (b) which provides as follows:

> "2. Provided that national laws or regulations may make exceptions in respect of:
>
> (a) injury incurred otherwise than in the service of the ship;
>
> (b) injury or sickness due to the wilful act, default, or misbehaviour of the sick, injured, or deceased person;"

The "national laws and regulations" referred to are not only the statutory law but also the decisional law. This was the view of all the executive departments; the State Department and also the acting solicitor. The views of the various departments in this regard are found in the report above mentioned.

Mr. Hull considered the "national laws" of the United States to consist of both statutory and common law. He said, page 7 (Report No. 1328, 76th Congress, First Session, H. R. 6881):

> "* * * The present law of this country, as exemplified by statutes, court decisions, and admiralty or common law, * * *."

Mr. Hull, on page 11, refers to the opinion of Chairman of the Maritime Commission that the Convention did not change the existing rights of seamen. He refers to that opinion in the following language:

> "* * * The Chairman of the Maritime Commission sees no advantage in ratification, as American law at present provides substantially equal or greater rights than those provided in the draft convention."

This also means that subdivision 2 of Article 2 refers to existing case law and not to new legislation to be enacted and that the case law saves a shipowner from a maintenance liability when the seaman is injured by his own misconduct.

On the effective date of the Convention the "national laws" of the United States provided that seamen injured while ashore for pleasure had to bear the cost of their own maintenance if the injury was due to misconduct or gross negligence.

Intoxication:

The Berwindglen (C. C. A. 1), 88 F. 2d 125;
Barlow v. *Pan Atlantic S. S. Corporation, et al.* (C. C. A. 2), 101 F. 2d 697;

Lortie v. *American-Hawaiian Steamship Company* (C. C. A. 9), 78 F. 2d 819.

Venereal Diseases or Gross Acts of Indiscretion:

The Alector, 263 Fed. 1007;

Chandler v. *The Annie Buckman*, 5 Fed. Cas. 449 (Case No. 2,591a);

Zambrano v. *Moore-McCormack Lines, Inc.*, 131 F. 2d 537.

Personal Fight:

Lortie v. *American-Hawaiian Steamship Company, supra;*

Brock v. *Standard Oil Company of New Jersey*, 33 F. Supp. 353.

Willful Misconduct:

Oliver v. *Calmar S. S. Co.*, 33 F. Supp. 356;

Jackson v. *Pittsburgh S. S. Co.* (CCA 6th), 131 F. 2d 668.

Thus the injury sustained by petitioner in this case was not one for which, under our "national laws", the shipowner was required to pay maintenance, on the effective date of the Convention.

The argument of petitioner that the exceptions in Article 2 Section 2 are inapplicable because they are not self-executing is based on a misunderstanding of the provisions. Throughout petitioner's brief, he erroneously implies that only laws enacted subsequent to the ratification of the Convention may be considered. The falsity of this argument has heretofore been amply demonstrated, in connection with the effect of the Convention on the Jones Act and the Death on the High Seas Act and the Longshoremen's Act.

Under the terms of the Convention the national laws of a country could limit the full operation of portions of the Convention as in the case of subdivision 2 of Article 2. Our national laws did limit the seamen's right to maintenance. It absolved a shipowner from a maintenance obligation where the injuries were incurred outside the service of the ship or due to willful act, default or misbehavior. The petitioner's act was certainly a willful one or misbehavior. His injuries so sustained come within the exception provided in the Treaty. He was properly denied maintenance.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE SHIPOWNER'S LIABILITY CONVENTION IS NOT SELF-EXECUTING. EVEN IF IT IS THE EXCEPTIONS THEREIN EXEMPT THE SHIPOWNER FROM LIABILITY FOR MAINTENANCE TO A SEAMAN WHO IS INJURED BY REASON OF HIS OWN MISCONDUCT. THE GENERAL MARITIME LAW OF THE UNITED STATES BARS RECOVERY IN SUCH CASES. MOREOVER, BECAUSE PETITIONER'S INJURIES OCCURRED WHILE HE WAS ASHORE FOR PLEASURE, HE IS UNDER NO CIRCUMSTANCES ENTITLED TO MAINTENANCE. THE DECREE OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

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APPENDIX.

SYNOPSIS OF CASES ALLOWING MAINTENANCE FOR SHORE INJURIES BECAUSE OF *AGUILAR* DICTA.

Barroom Brawls.

Moss v. *Alaska Packers Association*, 1945 AMC 493, 70 Cal. Ap. 2d 857, 160 P. 2d 224.

In a bar in Tasmania, Moss consumed 5 drinks of straight Scotch whiskey and was later struck over the head by persons unknown. He was allowed maintenance for injuries so sustained.

Nowery v. *Smith, et al.*, 69 F. Supp. 755 Aff'd 161 F. 2d 732.

Nowery and shipmates after consuming liquor in a bar quarreled and brawled. Maintenance was allowed.

Brawls in Public Streets.

Sullivan v. *United States of America*, 73 F. Supp. 525, aff'd 179 F. 2d 924.

Sullivan was injured in a street altercation, according to police records, after having consumed 18 to 20 glasses of beer. Maintenance was allowed because of libelant's story that the altercation was a hold-up, although he was unable to explain how his leg was fractured.

Stanley v. *Weyerhaeuser Steamship Company, et al.* (Superior Court, State of Cal.) 1947 AMC 411. (Not officially reported.)

When 17 miles from his vessel and under the influence of alcohol, Stanley received injuries under circumstances that he professed not to know. The shipowner had to pay maintenance.

Grovell v. *Stockard Steamship Co.*, 78 F. Supp. 931.

While ashore at Catania, Sicily, Grovell got into an argument with a native hack driver who flicked his whip at him causing injuries. Maintenance was allowed.

INJURIES SUFFERED AT PLACES REMOTE FROM VESSEL.

Smith v. *United States of America*, 167 F. 2d 550, reversing 74 F. Supp. 275.

Smith seven miles from his vessel fractured his ankle when leaving a friend's home in fall on defective sidewalk. Maintenance allowed.

Petersen v. *Marine Transport Lines, Inc.*, Superior Court of California, 1948 AMC 544. Petersen's vessel was in the Philippine Islands. While ashore for pleasure he rode to an outlying district in an army truck. He was set upon by assailants and injured. The court stated that there was no evidence of misconduct on Petersen's part but this is not unusual. The seaman denied it and the shipowner could never prove it. Petersen was allowed maintenance.

Taylor v. *United Fruit Company*, New York Supreme Court (Appellate Term), 1947 AMC 1297. (Not officially reported.)

Taylor, although working on a ship, ate and slept at home receiving money allowance therefor. When going from his home to purchase newspaper, he became embroiled in an altercation and received injuries. Judgment allowing maintenance was reversed by the Appellate Court.

Dasher v. *United States of America*, 59 F. Supp. 742. This decision involved only a matter of pleadings. Dasher after consuming liquor journeyed into the hills inland from the port of Oran, Algeria, where his ship was moored. While in the hills more drinking followed and he suffered injuries under circumstances which he professed were unknown to him. Exceptions were filed to the libel but they were overruled. Dasher's action was dismissed for failure to prosecute.

Ellis v. *American Hawaiian S. S. Co.*, 165 F. 2d. at 999. Ellis, after having consumed a quantity of alcohol dove from a spring board into a partly filled pool and received injuries. He was allowed maintenance.

Injuries As A Sequel To Vice.

Koistinen v. *American Export Lines, Inc.*, 194 Misc. (N. Y.) 942; 1948 A. M. C. 1464. While his vessel was at a port in Yugoslavia, Koistinen visited a saloon. There he met a woman who lured him to her room as the court puts it "for purposes not particularly platonic;". Koistinen allegedly resisted her charms and then refused to offer her money. She locked the door. Thereafter a man presumably her husband appeared in the doorway causing Koistinen to decide to leave by jumping from the window. In doing so, he sustained injuries. The court allowed him maintenance. In reaching this conclusion the court said that defendant had failed to *prove* [1] at the injuries were sustained through vice, willful misbehavior or deliberate act of indiscretion.

The rule established by this case makes ridiculous the standards of shipowner's liability for maintenance and makes impossible any defense even where the injuries are due to vice.